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(3)

No. 08-865

IN THE
Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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March 31, 2009

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Petitioner Consolidation Coal Co. files this supplemental brief to apprise the Court of recent developments in the Virginia Supreme Court. As Consolidation informed the Court in its supplemental brief of February 19, 2009, the Circuit Court for Buchanan County, Virginia entered a permanent injunction against Consolidation, prohibiting Consolidation "from the further dumping of water into the VP3 mine." Supp.A1. Following this order, Consolidation filed a petition for review to the Virginia Supreme Court.

On March 17, 2009, the Virginia Supreme Court issued an order dissolving the injunction. *See* 2d Supp.A1–4. In its order, the Virginia Supreme Court reaffirmed its holding that Consolidation does not have the legal right to store water in the VP3 mine, but noted that there remains an "insufficient record . . . to resolve the issue of Levisa Coal's entitlement to injunctive relief." 2d Supp.A2 (quoting *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 59, 662 S.E.2d 44, 52 (2008) (App.23a)). Because "the circuit court has not given the parties adequate opportunity to present evidence *on these issues*," 2d Supp.A4 (emphasis added), the Virginia Supreme Court ordered that "the portion of the Circuit Court of Buchanan County's order of February 10, 2009 granting a permanent injunction in favor of Levisa . . . is dissolved," 2d Supp.A1.

By its terms, this order addressing the question of remedy does not modify the Virginia Supreme Court's prior ruling concerning Consolidation's rights, which is the subject of Consolidation's petition before this Court, and thus does not affect the reasons for granting the petition. Although the

Virginia Supreme Court has ordered that Consolidation must be allowed to present evidence regarding the proper *remedy*, Consolidation still has had no opportunity (and will have no such opportunity) to present its evidence and defenses on the underlying issue on the *merits*—its right to store water in the VP3 mine. Indeed, the Virginia Supreme Court eliminated doubt on this score by quoting its earlier holding that this is "a case of a continuing trespass." 2d Supp.A3 (quoting *Levisa*, 276 Va. at 61, 662 S.E.2d at 53 (App.26a)).

The Virginia Supreme Court is correct that Consolidation must be allowed to present evidence regarding the proper remedy. But this legally sound order does not change the court's earlier ruling that determines Consolidation's legal rights (*i.e.*, its right to store water in the VP3 mine) without allowing Consolidation any opportunity to present evidence *on that issue.* It is this holding that violates due process. *See, e.g.*, *Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Granting the writ is necessary to ensure that, consistent with this Court's due process jurisprudence, Consolidation is afforded the basic right to present evidence in its defense.

For these reasons, and for the reasons stated in Consolidation's petition and supplemental brief, the Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
held at the Supreme Court Building in the City of Richmond on Tuesday the 17th day of March, 2009.

Before Justices Koontz and Lemons and Senior Justices Carrico and Russell.

Consolidation Coal Company,	)	
	)	
Petitioner,	)	
	)	Record No. 090356
against	)	Circuit Court No.
	)	CL06000408-01
Levisa Coal Company,	)	
Limited Partnership	)	
and L.L.P,	)	
	)	
Respondent.	)	

Upon a Petition Under Code § 8.01-626

Upon consideration of the petition filed pursuant to Code § 8.01-626, the respondent's brief in opposition and motion to dismiss, and the petitioner's opposition to the motion to dismiss, the petition is granted and the portion of the Circuit Court of Buchanan County's order of February 10, 2009 granting a permanent injunction in favor of Levisa Coal Company, Limited Partnership and L.L.P. ("Levisa") and against Consolidation Coal Company ("Consolidation") is dissolved.

In our opinion in Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 662 S.E.2d 44 (2008), we stated:

> Because the circuit court premised its judgment to deny Levisa Coal's request for injunctive relief, at least in part, on its erroneous determination that Consolidation Coal had the right to store excess water from the Buchanan Mine in the VP3 Mine, we will reverse that judgment. Additionally, because the circuit court rendered that judgment in the procedural posture of the case which resulted in an insufficient record for this Court on appeal to resolve the issue of Levisa Coal's entitlement to injunctive relief, we will also remand the case for further consideration of that issue by the circuit court.

Id. at 59, 662 S.E.2d at 52. We observed that the record before us was not sufficient to establish Levisa's entitlement to injunctive relief and we remanded the matter to the circuit court "for further proceedings consistent with the views expressed in [the] opinion" and directed the circuit court on remand to be guided by the principles articulated in the opinion "after granting the parties the opportunity to present evidence regarding them." Id. at 63, 662 S.E.2d at 54. In our opinion we further stated:

The principles that a court must apply in properly exercising its discretion to grant or deny a permanent injunction have been identified in prior decisions of this Court. "Under traditional equitable principles, a chancellor may enjoin a continuing trespass." Fancher [v. Fagella], 274 Va. [549,] 556, 650 S.E.2d [519,] 522 [(2007)]. See also Nishanian v. Sirohi, 243 Va. 337, 339, 414 S.E.2d 604, 606 (1992); Mobley v. Saponi Corporation, 215 Va. 643, 645, 212 S.E.2d 287, 289 (1975). However, even in a case involving a continuing trespass the guiding principle which remains constant is that the granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. See, e.g., Fancher, 274 Va. at 556, 650 S.E.2d at 522; Seventeen, Inc. [v. Pilot Life Ins. Co.], 215 Va. [74,] 78, 205 S.E.2d [648,] 653 [(1974)]; Akers [v. Mathieson Alkali Works], 151 Va. [1,] 8, 144 S.E. [492,] 494 [(1928)]. Thus, in a case of a continuing trespass, such as the present case, we have stated that if "the loss entailed upon [the trespasser] would be excessively out of proportion to the injury suffered by [the owner], or a serious detriment to the public, a court of equity might very properly . . . deny the injunction and leave

> the parties to settle their differences in a court of law." Clayborn [v. Camilla Red Ash Coal Co.], 128 Va. [383,] 399, 105 S.E. [117,] 122 [(1920)].

Id. at 61, 662 S.E.2d at 53.

At this stage of the proceedings, we express no view as to the entitlement of Levisa to a temporary or permanent injunction. As we stated in our opinion and mandate, upon remand the circuit court is to resolve this question and other related issues in the litigation "after granting the parties the opportunity to present evidence regarding them." Id. at 63, 662 S.E.2d at 54. We hold that the circuit court has not given the parties adequate opportunity to present evidence on these issues. Accordingly, the permanent injunction is dissolved and the matter is remanded to the circuit court for further proceedings guided by the principles contained in our opinion and granting the parties opportunity to present evidence.

A copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/

Deputy Clerk